Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2000 Biennial Regulatory Review	)	CC Docket No. 00-175
Separate Affiliate Requirements of	)	
Section 64.1903 of the Commission's Rules	)	

JOINT REPLY COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE AND OF THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES

THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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November 21, 2001

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Summary

In their initial Joint Comments, ITTA and OPASTCO noted the problematic tendency of regulators to "speculate about possible anticompetitive effects and then to adopt policies intended to protect new entrants and consumers from them." This pro-regulatory bias runs counter to Congressional policies, expressed at multiple places in the 1996 Act, favoring deregulation. The Joint Comments described how the separate affiliate rule in issue here exemplifies this tendency toward regulation and demonstrated the absence of any need for such rules, particularly in light of the extensive statutory powers of the Commission to review and correct any demonstrated, improper ILEC conduct. In light of these and other matters, ITTA and OPASTCO urged the Commission to terminate the separate affiliate rules for all independent ILECs.

In response to the Comments of other parties in this proceeding, ITTA and OPASTCO make three further points in this Reply. First, the continued imposition of the separate affiliate rules is not justified by the CLEC arguments asserted in favor of

continuing those rules. The arguments tend to be self-contradictory and irrelevant, particularly when they address BOC matters, rather than those of independent LECs.

Second, considerations arising from the historical separateness of BOCs and independent ILECs, as reflected and reinforced in the 1996 Act, directly support termination of the separate affiliate requirements for all non-BOC ILECs. Particularly as the Congress could have, but did not impose any Section 272-like requirements on the independent ILECs, the Commission has no basis for and should not do so now.

Last, ITTA and OPASTCO note that achievement of the Commission's deregulatory goals in this proceeding may require that the Commission take action to ensure that parallel state separate affiliate rules are likewise terminated. Failure to similarly adjustment intrastate separate affiliate rules could result in continued uneconomic burdens upon independent ILECs and could, further, create further undesirable opportunities for regulatory arbitrage.

ITTA and OPASTCO again conclude that continued imposition of the separate affiliate rules on independent incumbent LECs, far from promoting the public interest, works to handicap the development of competitive markets and to adversely impact the public interest. Accordingly, ITTA and OPASTCO urge the termination of the separate affiliate rules for all independent ILECs.

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Introduction

In its initial Comments, the Independent Telephone & Telecommunications Alliance (ITTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) addressed several basic propositions relevant to this proceeding:

- The separate affiliate rule is a manifestation of the Commission's past propensity to "speculate about possible anticompetitive effects and then to adopt policies intended to protect new entrants and consumers from them," which propensity "handicap[s] the market and postpone[s] the arrival of competition and consumer choice";[1]

- The purported justifications for such intervention via the separate affiliate rule rest upon an alleged ILEC control of "bottleneck facilities" now clearly attenuated by the vast legal, regulatory, and technological changes transpiring since the rule was adopted;

[1] "Working Toward Independents' Day," Remarks of Commissioner Michael K. Powell, Federal Communications Commission, before the Independent Telephone Pioneer Association, Washington, D.C. (May 7, 1998) at 3 ("Commissioner Powell's Remarks of May 7, 1998").

- The power of the Commission to review and correct improper ILEC conduct, if such there may be, is statutory in origin and comprehensive in scope, and neither requires nor materially benefits from the separate affiliate rule; and

- Section 272 of the 1996 Act, being solely directed to the Bell Operating Companies (BOCs) and their successors and assigns, reinforces the distinctions between BOC and non-BOC companies and the propriety of terminating the separate affiliate rules for the independent ILECs.

Other Comments filed in this docket also addressed various aspects of these themes, and ITTA and OPASTCO respond to those views herein.

In this Reply, we reaffirm the desirability of terminating the separate affiliate rules with respect to all independent LECs. This termination is warranted by the following factors:

- Continued imposition of the separate affiliate rules is not justified by the CLEC arguments asserted in favor of continuing those rules;

- Considerations arising from the historical dichotomy between BOCs and independent ILECs, as reflected and reinforced in the 1996 Act, directly support termination of the separate affiliate requirements for all non-BOC ILECs; and

- Achievement of the Commission's deregulatory goals may necessitate the conforming termination of state separate affiliate requirements.

ITTA and OPASTCO again conclude that continued imposition of the separate affiliate rules on independent incumbent LECs, far from promoting the public interest, works to handicap the development of competitive markets and to adversely impact the public interest.

1. Continued imposition of the separate affiliate rules is not justified by the arguments asserted in favor of that imposition.

Predictably, those benefiting from the asymmetrical competitive burdens imposed by the separate affiliate rule sought in their comments to perpetuate that rule. AT&T Corp. asserted the need for the rule because of the alleged "ability and incentive [of

independent ILECs] to misallocate costs."[2] Similarly, WorldCom noted "the incentive to misallocate costs"[3] and "to engage in price squeezes or discriminate."[4] These statements, however, merely repeat the Commission's "concerns about cost-shifting and anticompetitive conduct" first articulated in the Fifth Report and Order.[5] The initial ITTA and OPASTCO Comments discussed at length the inappropriateness of regulatory policy built upon this tendency of regulators to "speculate about possible anticompetitive effects" and then to adopt policies which "in practical effect, handicap the market and postpone the arrival of competition and consumer choice."[6] For the multiple reasons also described in their Comments, ITTA and OPASTCO demonstrated that this approach of acting on speculative concerns is inconsistent with congressional deregulatory policies plainly expressed in the 1996 Act, and thus disserves the public interest.

WorldCom further argued in its Comments that an absence of complaints about inappropriate ILEC conduct proves that the rule is working; this, because the purpose of the rule is to deter the kind of conduct which would give rise to such complaints.[7] This argument is unsound in several respects. First, it relies on *post hoc, ergo propter hoc* reasoning. That complaints have not been filed *since* the rule's adoption does not demonstrate that complaints have not been filed *because* of the rule's adoption. As ITTA and OPASTCO noted in their Comments, there was no record of abuse before adoption

[2] Comments of AT&T Corp. at 1, citing LEC Classification Order ¶ 159 ("AT&T Comments"). Unless otherwise indicated, all references to Comments herein refer to those pleadings filed in this proceeding on November 1, 2001.
[3] WorldCom Comments at 3.
[4] *Id.* at 5.
[5] *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* Fifth Report and Order, CC Docket No. 79-252, 98 F.C.C. 2d 1191 (1984) ("Fifth Report and Order").
[6] Commissioner Powell's Remarks of May 7, 1998 at 3.
[7] WorldCom Comments at 5.

of this rule, a fact specifically acknowledged by the Commission in the Fifth Report and Order.[8]

Second, AT&T's Comments contradict WorldCom's thesis. AT&T asserts that multiple violations of equivalent BOC rules have occurred and continue to occur.[9] The separate affiliate rule can hardly be credited, then, with deterring conduct not previously in evidence before its adoption, but allegedly in evidence after its adoption.

Third, as the Commission has previously discussed, the true source of deterrence is less the separate affiliate rule and more the underlying statutory authority of the Commission to investigate and correct improper conduct:

> We will continue to apply full Title II regulatory scrutiny to exchange access tariffs. To ensure ratepayers are not harmed, we will consider carefully complaints regarding rates for interstate services charged by affiliates of exchange telephone companies utilizing premium interconnections from those companies.[10]

AT&T[11] and WorldCom[12] admitted, in one fashion or another, that the separate affiliate rules are only partially efficacious. In contrast, as Sprint discussed in its Comments, [13] "other regulatory tools are more effective" than the separate affiliate rules. Violations of Sections 201 and 202 are readily reviewable through complaint processes and enforcement of the anti-trust laws. Evidential needs allegedly necessitating the separate affiliate rule are already covered by the Commission's cost allocation and accounting

[8] Fifth Report and Order at ¶ 10: "[D]uring the nine months that facilities-owning interexchange carriers affiliated with exchange telephone companies…have been subject to streamlined regulation, the Commission has received no petitions opposing their tariffs or formal complaints against them."
[9] AT&T Comments at 4 –5.
[10] *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* Fourth Report and Order, CC Docket No. 79-252, 95 F.C.C.2d 554, at ¶32 ("Fourth Report and Order").
[11] AT&T Comments at 3: "Requiring the affiliate to take access at tariffed rates 'reduces somewhat the risk of a price squeeze'…." (citing LEC Classification Order ¶ 163)(Emphasis added).

rules. The Commission itself has previously affirmed the adequacy of this statutory authority, noting:

> [W]e have regulatory tools to inhibit cost-shifting and anti-competitive conduct by exchange telephone companies.[14]

Particularly in light of the 1996 Act, the authority to review and enforce non-discriminatory access to incumbent networks is far broader now than when the separate affiliate rule was adopted. The WorldCom argument improperly credits the separate affiliate rule with the deterrence actually arising from the statutory mechanisms for detection and enforcement.

The 'marginal' utility of the rule, as argued by Sprint,[15] is further confirmed by the Comments of AT&T Corp. Although asserting that the purpose of the rule is to trace and document improper allocations, AT&T does not invoke the rule in support of its litany of allegations against SBC and Verizon.[16] The material used by AT&T, instead, derives from other sources, including non-regulatory public disclosure information. The contrast between AT&T's arguments and its actions reinforces ITTA and OPASTCO's view that other Commission rules provide ample basis for detecting alleged misconduct.[17] The statutes, and not this regulatory appendage, represent the real source of enforcement capability. Finally, the initial ITTA and OPASTCO Comments noted that the separate affiliate rule manifests the Commission's past tendency to "speculate about possible

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[12] WorldCom Comments at 8: "While not fully compensating for the ILEC's control of bottleneck facilities, the existing rule mitigates some of the risk to competition and consumers."(Emphasis added).
[13] Comments of Sprint Corporation at 4-5.
[14] Fifth Report and Order at ¶ 7.
[15] Sprint Comments at 4.
[16] As ITTA notes, *infra*, AT&T's focus on BOCs in a proceeding directed to independent incumbent LECs underscores the differences between BOCs and non-BOCs in various regulatory matters, including the separate affiliate rule.
[17] Indeed, it remains unclear from its Comments whether AT&T has availed itself of available complaint processes to redress the alleged improprieties, and if not, why not.

anticompetitive affects" [18] – in this case, those arising from the alleged control that independent LECs exercise by virtue of bottleneck facilities.[19] In the 1996 Act, however, Congress took direct and extraordinary action to address this problem. It terminated the legal monopoly of the incumbent carriers, thereby removing any *de jure* basis for monopolistic bottlenecks. To address the *de facto* aspects of local bottleneck facilities, Congress further required incumbent facility owners to allow discounted access to any and all portions of their telecommunications networks, in multiple and discreet elements, at prices to be established (if necessary) through regulatory-enforced arbitration. The whole purpose of this revolutionary paradigm, as the Commission has phrased it, was "to break the incumbents' control over local facilities."[20]

This perspective undercuts WorldCom objections to consideration of the separate affiliate rule on the grounds that "the Commission has thoroughly analyzed the relative benefits and costs of the existing rule numerous times during the last twenty years."[21] Very little has escaped change during the last twenty years, and especially so in the last five years. The Commission's annual analysis of the state of competition bears this out.[22] In 2000, CLEC market share grew 93%, to a total of 16,400,000 lines nationwide. Incumbent exchange carriers provided their competitors with 6,800,000 resale lines and 5,300,000 UNE loops at year-end 2000. Significantly, in 2000 CLECs provided about

[18] Commissioner Powell's Remarks of May 7, 1998 at 3.
[19] *See* AT&T Comments at 3.
[20] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 9-238 (1999) at ¶ 3
[21] WorldCom Comments at 3. ITTA demonstrated in its initial Comments that the separate affiliate rule did not result from any analytical quantification and comparison of benefits and costs, citing the Fourth and Fifth Reports and Orders. *See* the discussion in Joint Comments of the Independent Telephone & Telecommunications Alliance and of the Organization for the Promotion and Advancement of Small Telecommunications Companies, CC Docket No. 00-175, filed November 1, 2001, at 20-22.

35% of their end-user customer lines over their own local loop facilities. In New York, CLECs have taken 20% of the market; in Anchorage, Alaska, nearly 40% of the market. Overall, the Commission characterized CLEC growth as "robust."[23]

The substantial activity cited above cannot be squared with an alleged lock-down of access to bottleneck facilities. The facilities bypass reported above and the threat of further such bypass in the future demonstrate the continuing dilution of the bottleneck argument concerning discriminatory access – particularly in the context of an economically unattractive long distance market.[24] The alleged ability of and incentives for independent LECs to engineer, implement, and economically profit from discriminatory access to allegedly 'bottleneck' facilities remains undemonstrated and unconvincing. The only thing unchanged in this picture is the underlying and continuing statutory enforcement authority of the Commission, which is wholly sufficient to ensure compliance with the law.

2. Considerations arising from the historical dichotomy between BOCs and independent ILECs, as reflected and reinforced in the 1996 Act, directly support termination of the separate affiliate requirements for all non-BOC ILECs.

In their Comments, ITTA and OPASTCO questioned the purposes behind interjecting the requirements of Section 272 of the 1996 Act into this proceeding. Section 272 of the statute, as the Commission's NPRM acknowledged, applies only to BOCs. The separate affiliate rule is non-statutory and applies only to independent incumbent LECs who, by

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[22] "Federal Communications Commission Releases Latest Data on Local Telephone Competition," FCC News Release, May 21, 2001 at 1, summarizing data set forth in the attached "Local Telephone Competition: Status as of December 31, 2000," Common Carrier Bureau, May 2001.
[23] *Id.,* except for Anchorage, Alaska market status (for which see G. Nanette Thompson, Chair - Regulatory Commission of Alaska, "Speech to Anchorage Chamber," July 30, 2001 at 2: "My colleagues on other state commissions are astonished to hear that a competitor has captured 35-40% of the Anchorage market.")
[24] Sprint Comments at 5, noting "the relatively small payoff to be gained in the long distance market."

Commission definition, are non-BOCs.[25] As ITTA and OPASTCO noted, Congress, although it could have done otherwise, imposed separate affiliate requirements only on BOCs. It did not do so on independent LECs, and instead provided mechanisms for relief from some of the requirements it did impose on independent LECs. The relevance of Section 272 here (if any) is to further highlight the distinction between BOCs and the incumbent independent LECs.

As ITTA and OPASTCO observed in their Comments, BOCs and independent companies start from materially different historical bases. Even after the Bell System breakup, the individual BOCs remained large and dominant when contrasted to the smaller independent carriers. They started with substantial market power in multiple major markets, necessitating the continued judicial scrutiny applied in the post-breakup period. The mega-mergers of the past five years have further consolidated and aggrandized the positioning and power of these companies, which are many times greater by any standard than the typical non-BOC independent.

Independent LECs, in contrast, historically served lesser markets, mostly semi-urban or rural in nature. Their scattered serving areas and reduced population densities limited their economies of scope and scale. As a result, independent LECs typically exercised far less economic power than their BOC counterparts. Indeed, Congress recognized that many of these independents faced "competition from a telecommunications carrier that is a large global or nationwide entity," such as a BOC, and provided means for ensuring

[25] *See* 47 C.F.R. § 64.1902.

that competitive rules in the 1996 Act would be equitably applied to such independents under such circumstances.[26]

The distinction between BOCs and independent LECs is apparent in AT&T's Comments, noted above. Though arguing the need for separate affiliate rules for independent LECs, AT&T concentrates on examples of alleged BOC misconduct, much of it directed to a truly dominant BOC, SBC. The unintended effect of this is to further highlight the vast gulf between BOCs and independent LECs. For example, AT&T asserts that SBC has 10 million local customers in Texas. All of ITTA's members, together, do not have 10 million local customers in all of their serving states combined. All of OPASTCO's members, together, do not have 10 million local customers in all of their combined serving areas. AT&T asserts that an SBC affiliate has secured 4.6 million long distance customers in a four-state area. No ITTA member has 4.6 million long distance customers in any four- (or eight- or sixteen-) state area. All of ITTA's members combined do not have 4.6 million long distance customers. All of OPASTCO's members combined do not have 4.6 million long distance customers.

Congress invested the Act with specific restrictions in Section 272 to ensure that the BOCs remained under regulatory scrutiny because of their large size, scope of operations, and substantial economic power. No equivalent restrictions were imposed upon independent incumbent LECs because these considerations and concerns did not apply to such companies. Section 272, if it has any relevance at all to these proceedings, merely serves to highlight the historical and continuing divide between two groups of incumbent local carriers – BOCs and independents.

[26] *See* Joint Explanatory Statement of the Committee of Conference, Conference Report S. 652 at 119 (January 31, 1996).

Given this dichotomy, ITTA and OPASTCO recommended in their Comments that reducing regulation on all ILECs, beginning with the non-BOC independents, would directly serve the public interest. Other commenting parties made similar recommendations. The National Telephone Cooperative Association, in urging elimination of the separate affiliate rule on behalf of its rural telephone company members, noted that "[t]here is no reason to … continue to impose section 272 separate affiliate requirements on non-Bell Operating Companies that were never intended to be covered by the statute."[27] Similarly, Sprint noted that "in the context of LECs offering long distance, there have always been two categories: BOCs and [independent] ILECs" and called for termination of the separate affiliate rule for all independent LECs.[28] ITTA and OPASTCO concur in these statements and again urge termination of the separate affiliate rule for all independent ILECs.

3. Achievement of the Commission's deregulatory goals may necessitate the conforming termination of state separate affiliate requirements.

In the concurrent unified intercarrier compensation proceeding,[29] the Commission noted that effectuation of federal policies may necessitate conforming changes in state policies:

> …We also seek comment on whether, in order to achieve the benefits of a uniform intercarrier compensation regime, state public utility commissions would need to move intrastate access charges to forward-looking costs.[30]

[27] NTCA Comments at 5-6.
[28] Sprint Comments at 7. ITTA believes that in many circumstances, the 2% distinction it has promoted in various Commission proceedings remains a necessary and publicly beneficial point of demarcation for regulatory purposes. Nonetheless, and without necessarily agreeing with each of Sprint's arguments, ITTA does agree that in the current proceeding the separate affiliate rule inflicts inappropriate burdens on and adversely impacts the consumers of all non-BOC, independent LECs. Accordingly, this rule should be eliminated for all such carriers.
[29] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket No. 01-92 (released April 27, 2001) ("Intercarrier Compensation Notice").
[30] Intercarrier Compensation Notice at ¶ 99.

ITTA separately observed in that proceeding that jurisdictionally divergent cost definitions and cost recovery structures could also become sources of the regulatory arbitrage problem occasioning that proceeding. Further, in the universal service arena the U.S. Court of Appeals for the Tenth Circuit also noted recently the Commission's responsibility for securing conforming state action:

> Nevertheless, the FCC may not simply assume that the states will act on their own to preserve and advance universal service. It remains obligated to create some inducement – a "carrot" or a "stick," for example, or simply a binding cooperative agreement with the states – for the states to assist in implementing the goals of universal service…. On remand, the FCC is required to develop mechanisms to induce adequate state action.[31]

Similar considerations may be at work in this proceeding.

Sprint, for example, argued that preemption of state separate affiliate requirements would be necessary to achieve the Commission's goals of regulatory relief and enhanced facilities-based competitive entry by resellers.[32] Elimination of federal requirements for separate affiliates without concurrent elimination of parallel state requirements could directly frustrate Commission objectives in at least two ways. First, any requirement for a separate affiliate, irrespective of the jurisdictional origin, imposes the regulatory costs and burdens previously identified by the Commission and discussed by ITTA and OPASTCO in their Comments. Whatever the jurisdictional source of such a requirement, the "loss of dynamism which can result from regulation"[33] is the same. Second, the existence of disparate federal and state separate affiliate rules could create the interstices for regulatory arbitrage and the associated non-economic, anti-public

[31] *Qwest Corp. v. FCC,* No. 99-9546 (10th Cir., July 31,2001) at *13-14.
[32] Sprint Comments at 9.
[33] *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* First Report and Order, 85 F.C.C.2d 1 (1980) at ¶11.

interest conduct which is consuming Commission time and effort in the intercarrier compensation proceeding. Therefore, as part of the elimination of the federal separate affiliate requirement, ITTA and OPASTCO recommend Commission consideration of 'inducements' to the states to abandon equivalent rules in the intrastate jurisdiction.

Conclusion

Contrary to AT&T's assertion,[34] the Commission initially determined in the early stages of this proceeding that protection of the public interest did not require a separate affiliate rule for independent incumbent LECs. The Commission "[did] not believe that the limited potential problems warrant[ed] a heavy regulatory burden on these carriers with consequent costs and inefficiencies"[35] and affirmed as an alternative its powers and intention to "scrutinize interconnection arrangements for discrimination through our examination of exchange access tariffs and our complaint process."[36] The subsequent change of heart experienced by the Commission between the Fourth Report and Order and the Fifth Report and Order, which resulted in the current rules, did not arise from a change in evidence. Indeed, as ITTA and OPASTCO have noted, the Commission imposed these rules notwithstanding the demonstrated absence of complaints directed against independent ILECs.[37]

ITTA and OPASTCO again urge the Commission to review its own prior pronouncements and to reinstate its prior views on this issue. The AT&T and WorldCom Comments discussed above are based largely on pro-regulatory precepts contrary to the

[34] AT&T Comments at 2: "…[T]he Commission has consistently found that independent incumbent LECs' facilities-based interexchange services should be provided through a separate affiliate…."
[35] Fourth Report and Order at ¶ 33.
[36] *Id.* at ¶ 32.

deregulatory letter and spirit of the 1996 Act. The evidence adduced in those Comments is self-contradictory and merely reinforces the view that separate affiliate rules are unnecessary for independent incumbent LECs. Section 272 further intensifies the contrast between the BOCs, for whom such rules were Congressionally mandated, and the independent ILECs, for whom no such rules were mandated, and also supports termination of the separate affiliate rules.

Most importantly, the Commission's power to examine carrier conduct, to detect misconduct, and to enforce corrective measures with respect to independent LECs does not derive from and will remain unaffected by termination of the separate affiliate rule. Reliance upon such enforcement, rather than speculative interventionism, is a course more consistent with the pro-competitive, deregulatory paradigm established by Congress in the 1996 Act. Given the statutory alternatives already in place, continuation of the separate affiliate rule for independent LECs is unnecessary to protect consumer interests. Rather, the rule merely perpetuates continued regulatory interference in the marketplace, to the detriment of consumers and competitors alike.

Respectfully submitted,

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[37] Fifth Report and Order at ¶ 10.

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